No. 88-1703

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

RICHARD D. SHAPERO - - - - Petitioner

versus

KENTUCKY BAR ASSOCIATION - - Respondent

On Petition For a Writ of Certiorari to the
Supreme Court of Kentucky

PETITIONER'S REPLY BRIEF

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RICHARD D. SHAPERO - - - - *Petitioner*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

PETITIONER'S REPLY BRIEF

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1. The decision below involves an important question which directly affects this Court's jurisdiction and is in conflict with this Court's decision in *Shapero* v. *Kentucky Bar Association*.

The only rationale advanced by the Kentucky Bar Association (hereafter "KBA") to justify the Supreme Court of Kentucky's amendment of the *Shapero I* decision on remand is that the Supreme Court of Kentucky in *Shapero I* "simply misspoke itself." KBA's Brief at 8. In addition, the KBA argues that "[n]one of [the errors corrected by the Supreme Court of Kentucky in *Shapero II* and *Shapero III*] affected this Court's essential ruling. . . ." KBA's Brief at 9.

The KBA, however, fails to discuss, let alone distinguish *Tyler* v. *Magwire*, 84 U.S. (17 Wall.) 253 (1872), and the other cases which establish the invariability and conclusiveness of a judgment of the Su-

preme Court of the United States "upon the law and facts presented to it." *Ex parte Howard,* 76 U.S. (9 Wall.) 175, 183 (1869). Thus, the KBA simply ignores the holding in *In re Sanford Fork & Tool Co.,* 160 U.S. 247 (1895) that a lower court cannot vary, examine or review "*even for apparent error,* upon any matter decided on appeal." *Id.* at 255 (emphasis supplied). Accordingly, the Supreme Court of Kentucky, under the guise of correcting errors, may not recast the facts or the law presented to the Supreme Court of the United States so as to fundamentally alter the character of the decision reviewed by that Court.

The Supreme Court of Kentucky stated in *Shapero II* that it had erred in its *Shapero I* decision when it held that it had denied Shapero's request to mail out the letter in question. Therefore, the Supreme Court of Kentucky revised its opinion to state that Shapero's letter was never before the court or the KBA Ethics Committee.[1] Appendix to Petition for Certiorari at

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[1]The KBA's response to the Petition for Certiorari flatly contradicts the Supreme Court of Kentucky's holding in *Shapero II* that "the Ethics Committee never reviewed Mr. Shapero's request for permission to send the letter." Appendix to Petition for Certiorari at 31a. In its Brief, the KBA states on page 3 that Shapero "requested an Advisory Opinion from the Committee on Legal Ethics as to the propriety of his proposed letter of solicitation. . . ." This disagreement by the KBA with the Supreme Court of Kentucky surely would be resolved in favor of the KBA for the Ethics Committee's own opinion specifically referred to the Shapero letter when it stated that "[s]everal requests for advisory opinions have been forwarded . . . seeking approval of 'targeted direct mail advertising' to . . . victims of foreclosures. . . ." See Advisory Opinion E-310, reproduced in the Appendix to KBA's Brief at 14a.

31a. As a consequence, the Supreme Court of Kentucky also held that its opinion in *Shapero I* was merely an advisory opinion which "had no legally binding effect on Shapero." *Id.* By making these changes in the facts and the law respecting its decision in *Shapero I*, the Supreme Court of Kentucky retrospectively fundamentally altered *Shapero I* from a decision which was reviewable by this Court to one which was not.

It is beyond question that this Court only reviews cases or controversies and that it will not issue or review advisory opinions. See *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, 89 (1947), and *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) where this Court refused to review an administrative decision which only had "the force of a recommendation to the President" because it "would be to render an advisory opinion. . . ." Therefore, altering *Shapero I* from a determination of the legal rights of the Petitioner to an advisory opinion not binding on Shapero or anyone else (KBA's Brief at 13) fundamentally alters the *Shapero I* decision from a reviewable to a non-reviewable decision. The unavoidable implication of this alteration is that, according to the Supreme Court of Kentucky, this Court should never have decided the Shapero case.

Likewise, if the Shapero letter were not before the Supreme Court of Kentucky, there would have been no concrete commercial speech case for this Court to review. The First Amendment overbreadth doctrine does not apply to commercial speech and professional

advertising cases. *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 381 (1977), and *Village of Hoffman Estates* v. *Flipside, Hoffman Estates*, 455 U.S. 489, 497 (1982). Therefore, in commercial speech cases, this Court will not invalidate a rule prohibiting commercial speech except in a given, concrete fact situation. Absent the Shapero letter, there was no given fact situation and no reviewable case.

2. The decision below conflicts with recent decisions of this Court and of Federal Courts of Appeals and with the legislative history of the Civil Rights Attorney's Fees Act of 1976.

Without ever referring to the legislative history of the Civil Rights Attorney's Fees Act of 1976 or to the basic concept of the private attorneys general which it embodied, the KBA nonetheless argues that the action brought by Shapero in the Supreme Court of Kentucky and the Supreme Court of the United States was not "any action or proceeding to enforce a provision of [42 U.S.C. Sections 1981-1983] . . ." warranting an award of attorney's fees under 42 U.S.C. Section 1988.[2] Rather, the KBA argues that "[t]he primary reason why [Shapero] is not entitled to recover [attorneys'] fees in this proceeding is because he 'failed to mention Section 1983 in his Brief to [the Supreme Court of Kentucky] when [it] reviewed

[2]Shapero has not filed a claim for attorneys' fees for the proceedings before the Ethics Committee of the KBA; his claim is limited to proceedings in the Supreme Court of Kentucky and the Supreme Court of the United States.

the Board of Governors Advisory Opinion.' *Shapero II*, 763 S.W.2d at 127." KBA's Brief at 10.

This statement is patently false. This very issue *was* addressed by Shapero in his first brief in the Supreme Court of Kentucky in *Shapero I* in which he pointed out to that court that his petition was, in fact, a Section 1983 claim:

> This Court also appears to have exclusive jurisdiction over Shapero's federal constitutional claims arising *under 42 U.S.C. Section 1983* since federal courts must abstain from entertaining federal constitutional challenges to state disciplinary rules (even under the First Amendment) until the state has had an opportunity to rule. *Middlesex Ethics Committee* v. *Garden State Bar Assn.*, 457 U.S. 423 (1982).

(See Brief of Petitioner Richard D. Shapero in the Supreme Court of Kentucky, filed July 8, 1986, page 3, note 4, emphasis supplied).[3]

The KBA also argues that attorneys' fees are not warranted because the court's ruling in *Shapero I* "had no binding effect on Petitioner" and therefore, he was not deprived of any of his "civil rights as a consequence of the Court's ruling." KBA Brief at 11.

[3]Even if Section 1983 had not been specifically mentioned in his Brief, it would not affect Shapero's entitlement to attorneys' fees under Section 1988. In *Americans United for Separation of Church and State* v. *School District of Grand Rapids*, 835 F.2d 627, 632-34 (6th Cir. 1987), the Sixth Circuit ruled that it was not necessary to specifically mention 42 U.S.C. Section 1983 in order to recover Section 1988 attorneys' fees as long as the relief obtained vindicated civil rights of the type protected under Section 1983.

According to the KBA and the Supreme Court of Kentucky, Mr. Shapero remains unaffected by the Supreme Court of Kentucky's decision until he has mailed the letter in question, disciplinary proceedings have been instituted, and thereafter he has been enjoined or disciplined. *Id.* However, this position flies directly in the face of established precedent of this Court and of other federal courts.

In Spencer v. *Honorable Justices of Supreme Court of Pennsylvania*, 579 F. Supp. 880 (E.D. Penn. 1984), *aff'd sub nom Spencer* v. *Supreme Court of Pennsylvania*, 760 F.2d 261 (3d Cir. 1985), an attorney sought to challenge Pennsylvania's targeted direct mail solicitation prohibition. The Supreme Court of Pennsylvania argued that there was no concrete case or controversy because disciplinary action had not been taken against Mr. Spencer. The Pennsylvania federal courts disagreed, holding that since a plaintiff "suffers present injury and an irretrievable loss of first amendment rights to the extent that he obeys the disciplinary rules and thus foregoes his right to engage in arguably protected speech . . . [a] plaintiff is not first required to violate the disciplinary rules and risk his legal career on the hope that his constitutional arguments will be accepted in defense of quasi-criminal proceedings." *Id.* at 884. *See also, Steffel* v. *Thompson*, 415 U.S. 452, 462 (1974); *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973); and *Epperson* v. *Arkansas*, 393 U.S. 97 (1968).

In addition, the KBA argues that Shapero is not entitled to attorneys' fees because his appeal to the Supreme Court of Kentucky was, "at best, [an] administrative proceeding[] not necessary to the maintenance by him of his action in Federal Court." KBA's Brief at 12. There are at least three fundamental errors in this position.

First, even if the proceeding before the Supreme Court of Kentucky is characterized as administrative instead of judicial, the awarding of attorneys' fees incurred in that proceeding would be appropriate under Section 1988 because the proceedings were mandatory administrative proceedings such as those in *New York Gaslight Club* v. *Carey,* 447 U.S. 54 (1980). Because of *Middlesex Ethics Committee* v. *Garden State Bar Association,* 457 U.S. 423 (1982), Shapero was compelled to complete bar association-imposed administrative proceedings before he could resort to an independent Section 1983 action. Since Shapero was precluded by *Middlesex* from bringing his Section 1983 action to challenge the rule and its application to his letter in federal court, he was forced to bring it in the Supreme Court of Kentucky. See *Adams* v. *Attorney Registration and Disciplinary Commission,* 600 F. Supp. 390, 392, 393 (E.D. Ill. 1984), *aff'd* 801 F.2d 968 (7th Cir. 1986), where the court, applying *Middlesex,* abstained from ruling on a challenge to Illinois' targeted direct mail rules until the Illinois Supreme Court Committee on Professional Responsibility had first refused to entertain the challenge.

Second, the KBA cites no law that a proceeding brought before the Supreme Court of Kentucky is anything but judicial in nature. As the Supreme Court of Kentucky noted in *Ex parte Auditor of Public Accounts*, 609 S.W.2d 682, 683, 685 (Ky. 1980), Section 109 of the Kentucky Constitution states that "[t]he *judicial power* of the Commonwealth shall be vested exclusively in one Court of Justice . . ." (emphasis supplied), and Section 110 of the Kentucky Constitution empowers the Supreme Court of Kentucky to exercise appellate jurisdiction only. The Supreme Court of Kentucky further held in *Ex parte Auditor* that since the KBA was an arm of the Supreme Court of Kentucky, the KBA could not be sued in any of the other courts of the state and the Supreme Court of Kentucky was the only forum in which the controversy could be heard and officially resolved. *Id.* at 683.[4]

Finally, the KBA does not explain why, in any event, attorneys' fees would not be recoverable for the proceeding in the Supreme Court of the United States, which certainly was a proceeding in vindication of civil rights for purposes of Section 1988.

[4]There is also no indication anywhere in the Supreme Court of Kentucky's opinion in *Shapero II* and *Shapero III* that its decisions were anything but judicial in character even though in its brief in *Shapero II*, the KBA attempted to convince the Supreme Court of Kentucky that the proceeding in *Shapero I* was merely administrative. See Response of KBA In Opposition to Petitioner's Motion Requesting Attorneys' Fees and Expenses, served October 26, 1988, pp. 7-8.

3. Petitioner's pending Section 1983 action does not preclude the recovery of attorneys' fees in this proceeding.

The final argument raised by the KBA is that because there is a pending Section 1983 action in which attorneys' fees could be awarded, this Court should not order an award of attorneys' fees in this proceeding.[5]

However, the cases cited by the KBA involved attempts to obtain relief in a junior proceeding after a senior proceeding on the same issues had been commenced. In this case, on the other hand, the senior proceeding is the Shapero case emanating from the Supreme Court of Kentucky. The district court action challenging the Kentucky targeted direct mail rule was filed *after* the Supreme Court of Kentucky had issued its decision in *Shapero I* and involved questions relating not only to the validity of the rule adopted by the Supreme Court of Kentucky, but also questions of the enforceability of an agreement between the KBA and Shapero entered into several years before in settlement of earlier unrelated litigation.

Moreover, the courts in the best position to evaluate and award attorneys' fees are the courts before whom the Shapero case was argued. Having another court re-review all the work done in this Court and before the Supreme Court of Kentucky would be a waste of judicial efforts because the courts before whom that

[5]Shapero does not deny that attorneys' fees *could be* awarded by Judge Ballantine in the United States District Court in the event certiorari is denied. However, that fact alone does not provide a basis for this Court or the Supreme Court of Kentucky to deny an award of attorneys' fees under Section 1988.

work was done are more familiar with the quality and quantity of work performed before them.

CONCLUSION

The Brief of the KBA has failed in any logical fashion to demonstrate that certiorari should not be granted in this case. The actions of the Supreme Court of Kentucky, in revising its opinion in *Shapero I,* involved much more than the incidental correction of a typographical error. Permitting an inferior court, after reversal, to change its decision from one which is reviewable to an unreviewable advisory opinion most assuredly raises important questions about this Court's jurisdiction.

The KBA has failed to dispute Shapero's assertions that certiorari should also be granted because the ruling of the Supreme Court of Kentucky in denying his attorneys' fees both before that court and the Supreme Court of the United States is at odds with the legislative history of 42 U.S.C. Section 1988 and with numerous decisions of this Court and of federal appellate courts. The decision of the Supreme Court of Kentucky should be reversed and an award of attorneys' fees should be summarily ordered by this Court.

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